NO. 191.

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1919.

MICHAEL U. BOEHMER,
Petitioner,
against
PENNSYLVANIA RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

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CASES CITED.

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Western District of New York, entered upon a direction of a verdict by said District Court of "no cause of action" at close of a trial before court and jury (Record, Fols. 624-626). The judgment was entered April 5, 1917, (Fols. 39, 44). The order denying the plaintiff's (petitioner here) motion for a new trial (Record, Fols. 624-627) was entered March 28, 1917, (Record, Fols. 45-48), (Writ, Record, page 179).

The action was commenced January 22, 1916, to recover damages for personal injuries sustained by the plaintiff (hereinafter called the petitioner) in the defendant's (hereinafter called the carrier) interchange yard in the Village of Brocton, New York, on the eighth day of November, 1915.

PLEADINGS AND ISSUES.

The complaint alleges that the carrier was engaged in interstate commerce and that the petitioner was at the time in its employ as a brakeman on a train engaged in such interstate commerce, and that while so employed he sustained injuries, which necessitated the amputation of his right leg, through the negligence of the carrier in the following respects:

FIRST: That the defendant was negligent in handling a car without grab irons, handholds and sill steps on all outside four corners, in accordance with the provisions of the Safety Appliance Act and the orders of the Interstate Commerce Commission (Fols. 10-12).

SECOND: That the defendant was negligent in failing to instruct and warn the plaintiff that he would be required to board and work around and upon cars not equipped with grab irons, handholds and sill steps on all four

outside corners, and of the dangers in connection therewith, a fact which was known to the defendant, but which was unknown to the plaintiff (Complaint, Fol. 13).

The defendant's answer is in the nature of a general denial, as to its negligence, (Fol. 23), and for a second defense pleads assumption of risk by plaintiff. (Fols. 23-24). The answer, however, admits the incorporation of the defendant and that it was engaged in interstate commerce. (Answer, Fols. 20-21). It also admits that plaintiff was in its employ in such interstate commerce at the time he was injured. (Answer, Fol. 22).

The Trial Court directed a verdict of no cause of action solely upon the view taken by Trial Court of the effect of paragraph (f) of the Interstate Commerce Commission Order of March 13, 1911. (Transcript of Record, Fols. 615 to 619).

The court adopted the view that such paragraph extended the time in which the carrier was obliged to comply with the provisions of the Safety Appliance Acts beyond the date of the injury to the plaintiff.

The court also refused the plaintiff's motions and request to go to the jury upon the negligence of defendant in failing to instruct and warn the plaintiff of the dangers of his work. (Transcript of Record, Fols. 609-627).

Due exceptions were taken to these various rulings, (Transcript of Record, Fols 619 to 627) and they are the basis of assignment of errors Nos. 2 to 8 inclusive. (Transcript of Record, Fols. 638 to 644).

The United States Circuit Court of Appeals, Second Circuit, affirmed the above stated rulings of the Trial

Court. The opinion and decision being found in the Record at pages 169 to 172.

This court granted the petitioner's application for a writ of certiorari to review such decision and judgment of affirmance. (Record, page 179).

QUESTIONS PRESENTED IN THIS COURT.

The case presents three distinct propositions of law, each of which is of vital importance to a proper interpretation of the Safety Appliance Acts throughout the country, in order that there may be uniformity of decisions in the various Circuit Courts of Appeal, and upon which it does not appear that this court has heretofore directly passed. The Trial Court held:

FIRST: That the Safety Appliance Acts does not require handholds, grab irons and sill steps on each of the four outside corners of each box car hauled in interstate commerce.

SECOND: That the provisions of the Safety Appliance Acts were suspended as to the car in question by the order of the Interstate Commerce Commission of March 13, 1911.

THIRD: That the carrier did not owe any duty to the petitioner to advise and inform him that some of the cars on which he would be required to work had grab irons, handholds and sill steps on only two corners, while most of the cars had such appliances on all four corners.

These rulings were sustained by the Circuit Court of Appeals and constitute the errors presented to this court.

STATEMENT OF FACTS.

The plaintiff, Michael U. Boehmer, a man of 32 years of age became an employee of the defendant in the Signal Department some time in 1914 or 1915, as a carpenter. He then resided in Corry, Pa. (Transcript of Record, Fols. 78-81). As such he went over the railroad's system in a car where the men lived, but he had nothing to do with trains or cars; no switching, breaking, coupling or uncoupling. (Boehmer, Fols. 81-82).

Some time in September, 1915, he hired out, through Mr. Rupert, as a brakeman and at first worked out of Corry, Pa. After making his student trip which consisted of one complete round trip over the entire system on this division, over main line and over what we call the "creek," Buffalo to Emporium, and return, and Buffalo to Oil City and return, to Mayville and Erie. (Transcript of Record, Fols. 83-86), he then went working on the so-called "Corry turn job," that is taking an engine and caboose out of Corry, Pa., and pick up all the empties and take them to Oil City; get a train and bring it back to Corry, and set off to Titusville occasionally. In doing this work he was required to couple and uncouple cars and to board them. (Transcript of Record, Fols. 86-87).

His first regular trip on a train to Buffalo was on the occasion he was injured. There was no difference in the character of the work on that trip. (Transcript of Record, Fols. 88-89). He had boarded cars with his hands and feet. (Transcript of Record, Fol. 89). On the night he was injured they were ordered out of Oil City about 6:50 p. m. The crew were brakeman Delahunt and plaintiff, conductor William Idle, flagman William G. Pickard, engineer Hipwell and fireman unknown to plaintiff. (Tran-

script of Record, Fols. 90-91). Train made stop at Corry, where some cars were set out. (Transcript of Record, Fols. 91-92). Information came to stop at Brocton at P. S. or Kr. block station, where the company has operators employed to control the trains going in both directions. Orders to take sidings or to proceed, or any caution the company may deem fit are received from these stations. The initials stated are the code for these stations used in telegraphing from one to another. (Transcript of Record, Fols. 93-95). The message received read "Pick up grapes at Brocton." This message was received somewhere southwest of Brocton and after receipt the train proceeded to Brocton (Transcript of Record, Fols. 95-97). When train arrived at Brocton we stopped before we got to the switch, opened the switch and pulled in on the siding. The one next to the main track marked on the map "Passing siding #1 Track." We did not go in far enough to clear the points, some of train was out on the main track. The other brakeman cut off the engine and they went to get coal and water. Came back, coupled on and pulled into siding so as to clear points. (Transcript of Record, Fols. 97-99). The plaintiff was at the front end with the engine. The engine was cut off and pulled down near a switch and we were instructed by the conductor to go over on the Nickel Plate track which was kept clear for five minutes for us. The engine was backing up at the time and went until beyond the switch points which would permit going onto the traffic track. (Transcript of Record, Fols. 101-104 Delahunt, Fols. 325-331). Then plaintiff got off the engine. He was told to stay there and when Delahunt shoved the car by he was to catch the car and set the brake on it so it would not run too far. Plaintiff does not know how car was got out but it came out where he was across the switch points. (Transcript of Record, 105-107, Delahunt 325-330). Delahunt says it was "staked" out and described the process. (Transcript of Record, 330-331). The car

wanted was four or five deep in a string and it had to be shifted out and then staked back. (Transcript of Record, Delahunt, Fols. 331-333). That was all done by Delahunt. When he disconnected it and kicked it out onto a track there was nobody on it and Delahunt did not get on it to make the cut, but after he cut it off it seemed to be going too far and Delahunt did not want it to go too far, and chased after the car on its east side, the engineer's side of engine and attempted to get on the southeast corner; reached up to get hold and couldn't get hold of anything and then ran ahead to the other side and climbed on the step. He put his hands against the side of the car where the grab irons should be on the southeast corner. (Transcript of Record, Delahunt, Fols. 334-338). Delahunt had been a freight brakeman for about three and one-half years. (Transcript of Record, Delahunt, Fols. 320-322). After the car had been staken out and as it was passing the plaintiff he got on it by the handle and step on the side toward the lake, climbed up and set brake and stopped car. (Transcript of Record, Boehmer, Fols. 106-108).

If we call the tracks running north and south, and the lake on the west as all the railroad men look at it then I was on the west side of car. (Transcript of Record, Boehmer, Fol. 109).

The sill step did not extend down as far on this car as on some others.

Boehmer shows how he boarded car by putting his hand up to grab iron and foot in sill step, (Transcript of Record, Boehmer, Fol. 111), and said it was the way railroad men board these cars.

That he never observed railroad men take a lantern and look for handholds on car and that he was never instructed to do so. (Transcript of Record, Boehmer, Fol. 112).

After setting brakes Boehmer came to the ground and the other brakeman made the coupling when the engine came back. It was backed up far enough to get on #3 track. Delahunt went back to the cabin and I rode on the tank of the engine. I think on the right side looking toward the front. (Transcript of Record, Boehmer, Fols. 113-116). The engine and car proceeded down to a point which would allow the car to be backed into the track where the train was. The plaintiff then got off a few feet beyond the switch. (Transcript of Record, Boehmer, Fols. 117-120). The plaintiff waited until the car cleared the switch and swung the engineer down; stopped the engine with stop signal given with his railroad lamp. The engine stopped, the car somewhat beyond me and the engine still further. Plaintiff stepped across the track and closed the switch in order to permit the car and engine to back up to the train on #1 siding. (Boehmer, Transcript of Record, page 31. Folios are incorrect on this page). Plaintiff had been riding on the right-hand side of the engine, the engineer's side and when the engine and car stopped he had to cross the track to get to the switch lever and after seeing the points clear he stepped back to the position he came from, as our instructions are to work on the engineer's side wherever possible. (Transcript of Record, Boehmer, Fols. 125-128).

Plaintiff gave the engineer a signal with his lantern to back up. Just then someone came from the tower and ran over to engine probably with orders. Then the engineer started to back up and plaintiff attempted to board the car on the front end coming toward him on the engineer's

side. I stood there and gave the back-up signal, and as the car came to me I put my right foot up and my right hand up and attempted to board the car. I didn't get hold of anything, and I fell backwards on the side of the car very close to the front. (Transcript of Record, Boehmer, Fols. 129-132).

"Q. How high did you raise your foot?

A. About like that (shows).

Q. What was the object of your raising your foot so high?

A. Because I was on the car once before and I knew the step was very high on it.

Q. When you put your hands against the car where was your lantern?

A. In one of my hands; I cannot recall which one. That is the customary way of carrying a lantern.

Q. What happened when your hands struck the side of the car?

A. There was nothing there to get hold of.

Q. Was there any handle, handhold or grab iron there?

A. There was not.

Q. Was there any side step on that car on that side and end?

A. No, sir, there was not. I fell backwards, one of my legs was caught and crushed by the wheel I suppose. I guess I threw my lantern back of me when I fell, fell prone on back. Right foot caught and crushed through the arch. (Transcript of Record, Boehmer, Fols. 133-140, Transcript of Record, Hipwell, engineer, Fols. 539-545). He had some other minor injuries. This happened about 4 o'clock in the morning of November 8th. (Transcript of Record, Fols. 141-144). Plaintiff was taken to a hospital. Blood poisoning set in. The leg has been amputated two

or three times so that it is now off 5 or 6 inches above ankle, (Transcript of Record, Fols. 149-150, Testimony of Dr. William H. Marcy, pp. 88-95)."

This car had ladder with handholds or grab irons and sill steps on two diagonal opposite sides near the ends and none on the other two. (Transcript of Record, Hipwell, Fols. 553-556. Defendant's Exhibits Nos. 12 & 13).

Had Boehmer raised his lantern as the car approached him to about the height of his face and dropped it to his knees and then raised it and the engineer had observed these motions, he would take it as a "go ahead signal." (Transcript of Record, Hipwell, Fols. 561-562). Outside of a few odd cars from the Nickel Plate, a few Grand Trunk, Southern Pacific, occasionally Chicago & North Western, Seaboard and "Monon" lines and some of the refrigerator lines you scarcely ever see a car of any other system that is not equipped on all four corners with grab irons and sill steps and that has been so for last five, six and seven years. (Transcript of Record, Hipwell, Fols. 567 to 572). The railroads have men to inspect these cars at transfer points and to refuse them, and the regular trainmen do not inspect them for handholds and steps. That is done by inspectors in the yards at these transfer points. (Transcript of Record, Defendant's witness Keating, Fols. 482-484).

The plaintiff had never while in service as brakeman observed in use or being hauled on the Pennsylvania Railroad, cars that were not equipped on all four corners on each side, with handholds, ladders and steps.

"Q. Had any instructions been given to you while you were in the service as brakeman that cars without handholds and steps on each side and all four cor

ners would be used in the trains that you were to operate?

A. I did not. I never received any instructions.

Q. Were you ever warned that you would be expected to work in and about cars that were not equipped with handholds and sill steps on the outside, and all four corners of the car?

A. No, sir, I was not." (Transcript of Record, Plaintiff's Fols. 155-159).

Witness Hipwell had noticed cars not equipped with handholds and sill steps being hauled over the Nickel Plate. (Transcript of Record, Fol. 574).

Plaintiff on Re-direct examination, testified as follows:

"Q. Counsel asked you if you tried to climb on a car without a ladder before and you answered, 'no, sir.'

A. Yes, sir.

Q. How came it that you never tried to climb on a car without a ladder or handle before?

A. Because I never came in contact with one of that kind before." (Transcript of Record, Fols. 252-253).

The defendant produced a witness G. F. Laughlin who testified this particular car T. R. E. 32203 was owned by Armour Car Lines (Fol. 406) was built in 1897 (Fol. 408) and that they had no record of its being rebuilt. (Fols. 409-410). That when built it had cast iron wheels which last two and a half to three years and steel wheels longer and that it had cast iron wheels last time he saw it. And that its wheels were renewed approximately every two and half to three years not necessarily sent to a shop to do it, a repair track would do for that work, and that on repair tracks handholds and sill steps could be put on and were

being put on every day. (Laughlin, Fols. 432 to 434). The car had been in shops about 19 times for repairs including 1911; May, 1912; May, 1912; July, 1912; July, 1912; October, 1913; September, 1913; July, 1914. Those were some of the dates. (Laughlin, Fol. 445).

The witness produced a number of slips, fourteen, showing repairs ranging from 1912 down to Nov. 10, 1914. They show one pair of wheels changed Sept. 17, 1913, (Laughlin Fols. 500 to 503).

"Q. The replacing of wheels would be a regular repair to the car?

A. Yes, sir.

Q. All the other items then are regular repairs to the car, the items of work done on this car were regular repairs to it?

A. They were repairs to parts that wore out in regular service and required renewal.

Q. That is what you call regular repair as distinguished from rebuilding?

A. Practically. Yes, sir." (Laughlin Cross Examination, Fols. 503-504).

In addition to referring to the provisions and requirements of the various Safety Appliance acts the plaintiff introduced those portions of the order rules and directions of the Interstate Commerce Commission made March 13th, 1911, relating to sill steps and handholds on cars of the type in question in this cause. Those provisions are as follows:

SILL STEPS:

Number: Four (4).

Dimensions: Minimum cross-sectional area one-half (½) by one and one-half (1½) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably twelve (12) inches.

Minimum clear depth, eight (8) inches.

Location: One (1) near each end on each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill step. Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Sill steps exceeding twenty-one (21) inches in depth shall have an additional tread. Sill steps shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half (½) inch rivets.

SIDE-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, five-eighths (⅝) of an inch, wrought iron or steel. Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

Minimum clearance, two (2), preferably two and one-half (2½) inches.

Location: Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than (30) inches above center line of coupler, *except* as provided above, where tread of ladder is a

handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Side-handholds shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half (½) inch rivets.

(Transcript, Fols. 380 to 387, Plaintiff's Exhibit #4, pages 173-174-175).

The defendant offered in evidence an order of Interstate Commerce Commission dated March 13, 1911, which contains these two paragraphs:

"(f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight-train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running boards, ladders, sill steps and brake staffs, *provided,* that the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896 and March 2, 1903.

"(g) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight-train cars where the appliances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said or-

der." (Transcript, Fols. 463-464, Defendant's Exhibit #9, pages 176-177).

The other portions of the acts of the Interstate Commerce Commission were also put in evidence but do not seem to us to bear upon the question involved.

STATUTORY PROVISIONS.

On March 2, 1893, the Congress of the United States enacted the first "Safety Appliance Law," entitled: "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive wheel brakes and for other purposes."

The provisions of that act which are applicable to the facts of this case are as follows:

> "*Section 4.* That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."
>
> 27 Stat. L., 531.
>
> "*Section 8.* That any employee of any such common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."
>
> 27 Stat. L., 532.

The Act of 1893 as amended by the Act of 1896 was further amended by an act passed March 2, 1903, which provides that the provisions and requirements of the act approved March 2, 1893, and amended April 1, 1896,

> "shall be held to apply to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of Section 6 of said Act of March 2, 1893, eighteen hundred and ninety-three, as amended by the Act of April 1, 1896, or which are used upon street railways."

(The exception in Section 6 referred to above applies to four wheeled cars or to trains composed of eight wheel standard logging cars).

> "*Section 3.* That the provisions of this act (March 2, 1903) shall not take effect until September 1, 1903. Nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities or requirements of said act of March 2, 1893, as amended by the act of April 1, 1896; and all the provisions, powers, duties, requirements and liabilities of said act of March 2, 1893, as amended by the act of April 1, 1896, shall, except as specifically amended by this act, apply to this act."

By public Act No. 133 approved April 14, 1910, (36 Stat. L., 1397).

AN ACT to supplement "An act to promote the safety of employees *et cetera,*" was enacted by Congress which provides:

Section 1. "That the provisions of this act shall apply to every common carrier and every vehicle subject to the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, commonly known as the 'Safety Appliance Acts.'"

Section 2. "That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders:

PROVIDED, that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purposes."

Section 3. "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location and manner of application of the appliances provided for by section two of this act and section four of the Act of March, second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the commission may deem

proper, and thereafter said number, location, dimensions and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown, and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act:

PROVIDED, that the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act. Said commission is hereby given authority after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard prescribed by the commission."

Congress also, on April 5, 1910, enacted a law entitled:

"An act relating to the liability of common carriers by railroads to their employees in certain cases."

Section 1 provides:

"That every common carrier by railroad, while engaged in commerce between any of the several states

or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * * * resulting, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Section 3. "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee * * * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 4. "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

ARGUMENT.

POINT I.

THE SAFETY APPLIANCE ACTS REQUIRE SECURE HANDHOLDS, GRAB IRONS AND SILL STEPS AT ALL FOUR CORNERS ON THE OUTSIDE.

The provisions of the law must be given a reasonable interpretation and should be construed to mean that these appliances must be at the points and places where the exigencies of the work require them for the protection and safety of the employees.

The car upon which the accident occurred was provided with handholds and sill steps at its diagonal opposite corners. Petitioner contended below that under the Safety Appliance Act of 1893, as amended, respondent's car should have been provided with grab irons or handholds and sill steps at each of the four outside corners and the failure so to provide constituted negligence, but the court refused so to hold.

Section 4 of the Act of March 2, 1893, (27 St. L., 531), provides as follows:

> "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars."

By the amendatory Act of March 2, 1903, (32 St. L., 943), the original statute was extended so as to include tenders and locomotives and in part is as follows:

> "Shall be held to apply to common carriers by rail-

roads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of Section 6 of said Act of March 2, 1893, eighteen hundred and ninety-three, as amended by the Act of April 1, 1896, or which are used upon street railways" (32 Stat. L. 943).

The exception in Section 6 referred to above related to four wheel cars or trains composed of eight wheel standard logging cars and is not relevant to the case under consideration.

Section 3 of the Act just cited provides among other things "that nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities or requirements of said Act of March 2, 1893, as amended by the Act of April 1, 1896."

Under this statute petitioner contended that it was the duty of the carrier to provide handholds or grab irons on each of the four outside corners of the car and the failure of the carrier so to provide constituted negligence, but the Trial Court refused to so hold (Fol. 616).

The Act of 1893 was designed for the safety of employees and specifies "grab irons or handholds in the ends and sides of each car" as one of the requirements. It is true that it does not specify the number as one at each of the four outside corners of the car, still it is obvious that this number was intended. If this were not true the carrier would be equally relieved if the car had only one of its corners so provided. Certainly Congress had no such thought in mind when enacting the law, for it must be presumed that they well knew that in mounting a car the brakeman is obliged to seek the most convenient corner and often as in this case where he can be seen by the engineer so that his signals will be effective and where he can judge the distance from the train as the car approaches it. He has no opportunity to make an election.

While the Act of 1893 as amended does not specify the number of handholds, in interpreting that act as it was required to do by Section 3 of the Act of April 14, 1910, (36 Stat. L., 298), the Interstate Commerce Commission under date of March 13, 1911, by formal order specifies that a car to be properly equipped shall have four side handholds and still steps and definitely located them at the four outside corners of the car.

The standard thus fixed by the Interstate Commerce Commission, we submit, is in effect an interpretation of the Safety Appliance Act of 1893, and that therefore the Trial Court as well as the Court of Appeals erred in holding that two handholds at the diagonal opposite corners of the car were a compliance with the Statute. If four handholds and four sill steps were necessary to the safety of the employees in 1911, it was equally true that they were necessary for the safety of such employees prior to that date and it was for that reason that the Safety Appliance Act was enacted into law.

Section 2 of the amendment of 1910 (36 Stat. L. 298), provides that:

> "All cars must be equipped with secure sill steps and efficient handbrakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders."

This court in the case of *Texas P. R. Co. vs. Rigsby,* 241 U. S., 33, 37, held that Section 2 of said Act was in full force and effect as of September 4, 1912. The same position was taken in the case of *Illinois Central R. Co. vs. Williams,* 242 U. S., 462.

In the case of the *St. Joseph and Great Island Ry. Co. vs. Moore,* (243 U. S., 311, 315), this court said:

> "This grab iron requirement first appears in the Act of 1893, and the amendment ten years later (March 2, 1903), 32 Stat. at L. 943, Chap. 976, Comp. Stat. 1913, Sec. 8613, making the requirement in terms applicable to tenders, did not change it. Whatever may be said of 1893, there can be no doubt that in 1903 automatic couplers, and therefore uncoupling or pin-lifting levers, were in common, if not general, use, on the tenders of engines, and if Congress had intended them to be accepted as a substitute for handholds or grab irons, we must assume that the amendment of 1903 would have so provided. The statute requires both. If practical confirmation of this conclusion were desired, it is to be found in the fact that, in the order of Interstate Commerce Commission standardizing safety appliances, under the Act of Congress of April 14, 1910, (Stat. at L. 298, Chap. 160, Comp. Stat. 1913,

Sec. 8617), two rear end handholds are required on locomotives, 'one near each side on rear end of tender on the face of the end sill.' "

"It is not admissible to allow such an important statutory requirement to be satisfied by equivalents or by anything less than literal compliance with what it prescribes."

The order of the Interstate Commerce Commission referred to by this court is the one which also standardizes the requirements with reference to four handholds or grab irons and sill steps at each of the four outside corners of the cars.

The fallacy of the position taken by the Court of Appeals lies in the fact that it held that the requirements of the Safety Appliance Act were fully met so long as the car had two handholds and sill steps at two of the diagonal corners, and that no duty rested upon the carrier to add to these appliances by placing handholds or grab irons and sill steps on the other two diagonal corners, they holding that so long as this car was in service at the time of the issuance by the Interstate Commerce Commission of the extension order for a period of five years, that the carrier was not required to put on additional equipment within the time of that extension. The Court of Appeals treated the order of the Interstate Commerce Commission standardizing equipment and fixing their location as in effect a new law abridging the existing statute. The petitioner's contention was and is that the Act of 1893 required handholds or grab irons at all corners of the car where the work of the men required their use, and that Section 3 of the Act of 1910 merely gave the Interstate Commerce Commission jurisdiction to standardize the equipment, and that the statute did not give them power to suspend the

operation and requirements of the statute that every car in service be equipped with handholds or grab irons and sill steps wherever the necessity of the work required their use for the safety of employees. The Interstate Commerce Commission under Section 3 of the Act of 1910 had merely the power to designate the location and size and to standardize such equipment as the statute had provided. The order of the Commission fixing the number of and location is merely an interpretation by that body of what were the requirements of the statute. The Commission, however, was given the power to allow a carrier an extension of five years to use cars equipped according to these requirements although the location and size was different from that which they had prescribed by their order of March 13, 1911.

That we are correct in asserting that the Court of Appeals erred in holding that the Act of 1893, as amended by the Act of 1910 was not in full force as to this car at the time of the accident, we think is clearly indicated by the decision of this court in the case of *Illinois Central R. Co. vs. Williams*, 242 U. S., 462. In that case Mr. Justice Clark, in an able opinion, fully considers the question and we think sustains the contention here made.

The petitioner contends that the decision of the Circuit Court of Appeals in this case, holding that handholds, grab irons and sill steps on two corners of the car, a compliance with the provisions of the Safety Appliance Act, is in conflict with the decisions of the United States Courts construing said act.

U. S. vs. B. & O. Ry., 184 Fed., 94.
U. S. vs. Norfolk & W. Ry. Co., 184 Fed., 99.
U. S. vs. C. of Ga. Ry. Co., 157 Fed., 893.

We can conceive of no set of facts that better illustrates the necessity of these handholds and sill steps at all four corners on the outside than the facts in this case.

In this switching operation and at the immediate time of the accident, the plaintiff was required to take a conspicuous position on the front of the leading car and to be on the engineer's side, who had control of the movement of the engine and car as it was being backed toward the train, to which it was to be coupled. (Fols. 312-313, Rule 102). He could not get in a conspicuous place where he could be seen by the engineer and be at the foremost end, unless there was a grab iron, handhold and sill step on the outside corner for him to ride upon. That there was a ladder on that side of the car next the engine would be of no avail under such circumstances, because had the plaintiff got on such ladder, it would have been impossible for him to judge, in the darkness, when the car had approached the end of the train sufficiently near for him to signal down the engineer; then run forward to be in a position to make the coupling. When we consider that this exact operation is performed probably hundreds of thousands of times every day in railroad operations throughout the United States, one can realize how absolutely essential and necessary are grab irons, handholds and sill steps on all four outside corners of cars, and we urge that the statute in and of itself intended these appliances should be at every point on the car where the danger and necessity of the service require them. That under the decisions construing the statute it has not been left to the judgment of railroad companies to determine what was and was not a compliance. In every case that we have been able to find the courts have uniformly construed the statute as in full operation and to require these appliances at all points and at each end where it appears the service requires it or danger to employes was obviated.

Delahunt, a brakeman of three and one-half years' experience had attempted to board this very car at the identical corner where Boehmer was injured only five minutes before such injury. (Transcript of Record, Delahunt, Fols. 334-338).

He wanted to get on the car to stop it after it had been "staked" out and under the kick was apparently running too far. He put his hands against the car at the place where a grab iron should have been and finding none he was obliged to run to other side and after the car to get on it.

Fortunately it stopped on this occasion, but suppose the car had been running too fast for Delahunt to run around the end and catch it and had crashed into other cars on which were men working on the assumption that Delahunt had boarded and stopped it? Suppose it was running on a down grade under such circumstances? Supposing a man was fixing a coupling on a car to which it was to be coupled and was relying upon Delahunt to "get it" and check its speed?

These are only a few of the reasons why handholds, grab irons and sill steps were required by the Safety Appliance Acts and why they were required on the sides on all four corners.

The Safety Appliance Acts are remedial statutes and must be construed so as to accomplish the intent of Congress.

Johnson vs. Southern Pacific Company, 196 U. S. 1.

They impose an absolute and unqualified duty on carriers engaged in interstate commerce to equip all cars with the appliances provided by the statute, and to maintain the same in a secure condition.

Texas and P. R. Co. vs. Rigsby, 241 U. S. 33;
St. Louis J. M. & S. R. Co. vs. Taylor, 210 U. S. 218;

Chicago B. & L. R. Co. vs. U. S., 220 U. S., 559;
Delk vs. St. Louis & S. F. R. Co., 220 U. S., 580;
U. S. vs. Pere Marquette Ry. Co., 211 F. 220.

The statutes are not satisfied by equivalents or anything less than literal compliance with what is prescribed. A pin lifter or uncoupling lever extending across the tender just above the coupler cannot be held in effect a substitute for the grab irons and handholds required by the statute.

St. Joseph & Grand Island Ry. Co. vs. Moore, 37 Sup. Court Rep., 278.

Providing an automatic coupler which could be operated from one side of a car is not a compliance if an employee would have to go between the cars to make coupling if at the other side thereof.

U. S. vs. Central of Georgia Ry. Co., 157 Fed. 893.

These handholds and grab irons must be on all corners of the car. We so interpret the decisions in the cases of U. S. vs. Baltimore & O. R. Co., 184 Fed. 94 and U. S. vs. Norfolk & W. Ry. Co., 184 Fed. 99.

Any variation from the customary and usual location and style of handhold, grab iron or sill step, or in the placing of the lights may lead to injury to the employee.

Erie R. Co. vs. Schleenbaker, 257 Fed. 667.

We respectfully urge that it was error to hold that ladders, handholds, grab irons and sill steps were not required by the Safety Appliance Acts to be on all four corners of this car.

POINT II.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION OF MARCH 13, 1911, REQUIRES HANDHOLDS, GRAB IRONS AND SILL STEPS AT ALL FOUR OUTSIDE CORNERS OF A CAR. PARAGRAPH (F) OF SUCH ORDER DID NOT EXTEND THE TIME IN WHICH SUCH APPLIANCES WERE TO BE PROVIDED BUT MERELY EXTENDED THE TIME IN WHICH THE APPLIANCES WERE TO BE STANDARDIZED.

Illinois Central vs. Williams, 242, U. S., 462.

Petitioner contends that the following provision in the orders and rules of the Interstate Commerce Commission promulgated on March 13, 1911, pursuant to the provisions of law, specifically require that each car be provided with four sill steps and four handholds. The orders with reference to the location of the sill steps provides as follows: "One near each end on each side of car, so that there shall be not more than eighteen inches from end of car to center of tread of sill step * * * tread shall be not more than twenty-four, preferably not more than twenty-two, inches above the top of rail." The provision with reference to the location of the four side handholds is as follows: "Horizontal; one near each end of each side of car; said handholds shall be not less than twenty-four nor more than thirty inches above center line of coupler, except as provided above, where tread of ladder is a handhold. Clearance of outer end of handhold shall be not more than one foot."

Petitioner contended in the Trial Court that this distinctly standardized the safety appliances required on all

cars, but the Trail Court at the instance of the defendant below held that it was untenable inasmuch as subdivision "F" of the said order of the Interstate Commerce Commission of March 13, 1911, extended the period for complying with the provisions as to handholds and sill steps for five years or to a date beyond that on which the accident occurred, with which position the Court of Appeals agreed.

In considering this subdivision it is necessary that subdivisions "F" and "G" be referred to. They are as follows:

> (f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running boards, ladders, sill steps and brake staffs, *provided,* that the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.
>
> (g) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight-train cars where the appliances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said order.

(Transcript, Fols. 463-464, Defendant's Exhibit No. 9).

A complete answer to the position taken by the lower court we submit is found in subdivision "G."

Subdivision "F" provides that "When a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to standards prescribed in said order in respect to handholds, running boards, ladders, sill steps and brake staffs."

Subdivision "F" is qualified, however, by subdivision "G." It will be observed that the latter provides that "carriers are not required to change the location of handholds (except end handholds under end sills) ladders, sill steps, brake wheels, and brake staffs on freight train cars where the appliances are within three inches of the required location, except that when cars undergo *regular repairs* they must then be made to comply with the standards prescribed in said order."

It was shown at the trial that this car did undergo *regular repairs* on numerous occasions and notwithstanding that fact, grab irons or handholds and sill steps were not placed on all four corners as required. The evidence shows that the car had been in shop for repairs nineteen times including 1911; twice in May and twice in July, 1912, in September and October, 1913, and July, 1914, which are some of the dates only. It was shown from the General Superintendent of the line owning this car that one pair of wheels was changed on September 17, 1913, (Fols. 500-503), and that the repairs referred to were *regular repairs* as distinguished from rebuilding (Fols. 503-504).

Since therefore this car underwent "regular repairs" as specified in subdivision "G" referred to, it was the duty of the carrier to comply with the provisions of the Interstate Commerce Commission by installing the four sill steps and four side handholds at each of the outside corners of the car, notwithstanding the five year extension authorized

in subdivision "F," and that the failure so to do constituted negligence on the part of the carrier. Both the Trial Court as well as the Court of Appeals held that notwithstanding subdivisions "F" and "G" that the duty of the carrier to install these appliances had not attached because of the five year extension and that therefore there was no negligence on the part of the carrier in its failure so to do.

Had there been a sill step and grab iron at this point where Delahunt and the petitioner attempted to board this car on this night and the same had been removed before they attempted to use it or them, then the carrier would be liable; but the Circuit Court and Trial Court have held in this case that because they were not on at all, the extention order relieved the carrier from putting them on during the five years.

Suppose we assume, for sake of argument, that this car had one grab iron or handhold up by the roof over the door on each side. Would not that be a compliance with the statute as suspended by the decision in this case? Could not this car be used for the five years in that condition without liability?

The answer might be that the orders of the Interstate Commerce Commission required these appliances to be within three inches of the standardized location—but we ask—what appliances? One on each side? Or one within three inches of every place where experience had demonstrated they were required and where the commission had ordered them to be?

We respectfully urge that it was error to hold that paragraph (f) of the order of the Interstate Commerce Com-

mission relieved the carrier of the duty to equip this car with handholds, grab irons and sill steps on all corners.

WHERE AN EMPLOYEE IS INJURED BY REASON OF THE FAILURE TO EQUIP A CAR WITH THE NECESSARY AND REQUIRED SAFETY APPLIANCES LIABILITY FOR THE DAMAGES SUFFERED IS IMPLIED AND THE RIGHT THERETO SEEMS ABSOLUTE.

> "The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in a secure condition."

Texas Ry. Co. v. Rigsby, 241 U. S. 33, citing St. Louis Co. v. Taylor, 210 U. S., 281; C. B. & Q. v. United States, 220 U. S., 559; Delk v. St. Louis Ry. Co., 220 U. S., 580.

> "A disregard of the command of the statute is a wrongful act and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damages from the party in default is implied."
>
> Texas Ry. Co. v. Rigsby, 36 Sup. Ct. Rep. p. 484.

Case cited and approved in

San Antonio & Aranas Pass Ry. Co. v. Wagner, 241 U. S., 476, 36 Sup. Ct. Rep., at page 630.

IF THE INJURY RESULTS FROM A FAILURE TO COMPLY WITH THE SAFETY APPLIANCE ACTS, THEN UNDER THE PROVISIONS OF SUCH ACTS AND OF THE EMPLOYERS' LIABILITY ACTS, "ASSUMPTION OF RISK" AND "CONTRIBUTORY

NEGLIGENCE" ARE ELIMINATED AND DO NOT CONSTITUTE DEFENSE.

Grand Trunk W. R. Co. v. Lindsay, 223 U. S. 42, 34 Sup. Ct. Rep. 581;

Johnson v. Great Northern Ry. Co., (C. C. of A. Eighth Circuit) 178 Fed. 643;

San Antonia Ry. Co. v. Wagner, 241 U. S. 476;

Texas Ry. Co. vs. Rigsby, 241 U. S. 33; Provisions of Statutes quoted *supra*.

POINT III.

THE DEFENDANT WAS GUILTY OF NEGLIGENCE IN NOT INSTRUCTING AND WARNING THE PLAINTIFF THAT IT WOULD REQUIRE HIM TO WORK IN AND ABOUT CARS NOT FITTED AND EQUIPPED WITH THE NECESSARY HANDHOLDS, GRAB IRONS AND STEPS PROVIDED FOR BY THE SAFETY APPLIANCE ACTS.

Cars were almost universally supplied with steps and handholds or grab irons on the sides thereof on all four corners. The plaintiff says every car he had ever handled, ridden or observed in his short experience in this work was so supplied. It appears that other Fruit Growers' Express Cars were so equipped. The accident happened in the night when it was dark. While the plaintiff had a lantern with him, it is a well known fact that the person carrying a lantern in the dark cannot see the details of surroundings as well as one can who is not immediately in the center of the lighted area. That is, when we look out into the dark from the center of a lighted area our vision is obscured and confused: the lantern was for use in signalling and in indicating to others the presence of the man, his position, and the position of a car or train when he is riding it.

Petitioner contends that the carrier owed him the duty of advising or informing him that some of the cars with reference to which he would be required to operate had grab irons or handholds on only two corners, while others had them on all four. Both the Trial Court and the Court of Appeals held however that the respondent owed petitioner no duty in that regard.

The evidence showed that every car, handled, ridden or observed by petitioner in his short experience in this work was supplied with handholds or grab irons on all four outside corners of the car and that other cars belonging to the Fruit Growers Express, of which this was one, were so equipped. The accident happened at night and it was shown that had he raised his lantern used for signaling purposes and then lowered it for the purpose of ascertaining whether these appliances were located at the point at which he attempted to board the car, it would have been equivalent to a signal to the engineer to "go ahead" (Fols. 561, 562). It was shown that these men board and drop off these cars more by instinct and practice than actual observation. It is because of this fact that the law requires this equipment at uniform and fixed places, and in subdivision "G" of the orders promulgated by the Commission direct that if they are located at a greater distance than three inches of the required location, they must be made to comply with the standards. As stated by this court in the case of *Illinois C. R. Co. vs. Williams*, 242 U. S., 462, 466:

> "That they shall be standardized, shall be of uniform size and character, and, so far as ladders and handholds are concerned, shall be placed as nearly as possible at a corresponding place on every car so that employees who work always in haste, and often in darkness and storm, may not be betrayed, to their

injury or death when they instinctively reach for the only protection which can avail them when confronted by such a crisis as often arises in their dangerous service."

"It is for such emergencies that these safety appliances are provided—for service in those instant decisions upon which the safety of life or limb of a man so often depends in this perilous employment—and therefore this law requires that ultimately the location of these ladders and handholds shall be absolutely fixed, so that the employee will know certainly that night or day he will find them in like place and of like size and usefulness on all cars, from whatever line of railway or section of the country they may come."

The opinion of the Circuit Court of Appeals upon this point discloses a difference of opinion on the part of the judges in this regard. The judge writing the opinion in reference to "green men" of which the petitioner was one, having had only about two months' experience, expresses doubt whether the court should assume that they would necessarily observe such relatively exceptional equipment as existed in the case at bar. He adds "it seems to me doubtful whether it passes so far beyond possibilities reasonably to be anticipated as to justify its exclusion from that latitude which a jury should be allowed in fixing fault. The parties did not stand upon an equality in knowledge and there seems to me a question whether the defendant might assume that the exceptional equipment had in less than two months come to the plaintiff's attention, or that he would not be misled by the much greater proportion of modern cars. However, my colleagues believe that as the old style was equally open to his observation, the defendant had the right to assume either that he would not act without looking, or if he had got so far as to establish instinctive habits,

that he would have already learned that he could not rely upon a safe support. In any case, they think, he cannot be excused from contributory negligence which, the case in this aspect being at common-law, is a defense."

As we have seen the only modification of this duty to equip was an allowance of time to change to the standard when the equipment was within three inches of the standardized location.

In this case the car was not equipped with any handhold, grab iron or step on the side of this car at the end where plaintiff was expected and required by his duty to board it, and so when he instinctively reached and stepped to board this car, he was, by reason of such absence of equipment, "betrayed" to his injury.

He had never come in contact with a car of that kind before (Fols. 252-253).

Inspectors were provided in these yards by the carrier and petitioner was under no duty to examine cars for these appliances. (Keating, Fols. 481 to 484). His duties required him to signal the engineer to stop after passing the switch points; get off and cross over track, throw the switch; get back and signal the engineer; as the car came toward him get "in a conspicuous position on the front of the leading car." (Record, Fols. 312, 313, Rule 102). Watch for the end of train to which car was to be coupled; signal engineer when car had approached end of train, get off, run forward, see coupler all right and then make the coupling.

We respectfully submit that with all these duties to perform the plaintiff was not in a position to make much inspection for grab irons or sill steps.

The plaintiff had a right to rely upon the assumption that the defendant would not require him to work on or about any car not properly equipped under the Safety Appliance Act and when the defendant required him to do so, it was an additional hazard which it should at least have warned him against.

> "It is a general rule, as respects any hazardous occupation, that the master shall inform his servants of all perils to which they will be exposed, which are or should reasonably be known to him, except such as are obvious to the servant, or through the exercise of ordinary care on their part may be foreseen, and in either event, injury therefrom reasonably avoided."
>
> M'Calman v. Illinois Central Ry. Co., 215 Fed. 465, 469.
>
> "This duty of the master so to inform his servants extends to any change made by him which introduces into their service a new element of danger."
>
> M'Calman v. Illinois Central, *supra.*
>
> "And the duty so imposed upon the master is of a primary character and is therefore nondelegable.
>
> M'Calman v. Illinois Central, *supra.*

We respectfully urge that it was error to refuse to submit this question to the jury and to hold as a matter of law that the carrier was not negligent or that the petitioner was guilty of contributory negligence.

CONCLUSION.

For the reasons hereinbefore stated we respectfully submit that the judgment of the Circuit Court of Appeals for the Second Circuit affirming a judgment and decision of the District Court of the United States for the Western District of New York should be reversed and the case re-

manded with instructions to grant the petitioner a new trial and for such other relief as may seem just and within the jurisdiction and practice of this court.

Respectfully submitted,

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